

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY COUNCIL OF ST. PAUL, MINNESOTA

In the Matter of All Licenses Held by
DRJ, Inc., d/b/a Diva's Overtime
Lounge

**ORDER DENYING MOTION FOR
SUMMARY DISPOSITION**

Pursuant to a schedule established at the March 5, 2007 Pre-Hearing Conference in this matter, the parties made submissions to Administrative Law Judge Eric L. Lipman regarding the Licensee's Motion for Summary Disposition.

Andrew J. Dawkins, Mansfield, Tanick & Cohen, P.A., 220 South Sixth Street, Suite 1700, Minneapolis, MN 55402-4511, appeared on behalf of the Licensee, DRJ, Inc. d/b/a Diva's Overtime Lounge ("DRJ" or "the Licensee"). Rachel Gunderson, Assistant City Attorney, 15 West Kellogg Boulevard, Suite 400, St. Paul, MN 55102, appeared on behalf of the City of St. Paul, Office of License, Inspections and Environmental Protection ("the City" or "LIEP").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED THAT:

1. The Motion for Summary Disposition is DENIED.
2. Counsel for the parties are further directed to confer with each other regarding the sequencing of witnesses at the evidentiary hearing in this matter, now scheduled for March 21st, 22nd and 23rd of 2007, and to report by **4:30 p.m. on March 16, 2007**, as to whether any agreements have been reached as to the scheduling of testimony.

Dated this 12th day of March, 2007.

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

DRJ's request for Summary Disposition pivots on the meaning, reach and effect of a November 28, 2006 settlement agreement between DRJ and the City of St. Paul and a later District Court Order implementing that agreement. The settlement agreement ended a nuisance action filed by the City against DRJ.¹ DRJ asserts that under the doctrine of merger and bar, the settlement of the nuisance action forecloses any later licensing sanctions that are based upon the same (or then-knowable) facts underlying the nuisance action.² The City replies in the alternative that the Office of Administrative Hearings does not have the power to grant the Licensee's request for summary relief; that regardless of the viability of DRJ's legal claims, the parties should proceed to an evidentiary hearing; and that the City is not estopped from pursuing licensing sanctions against DRJ.³

As a threshold matter, the City asserts that because the St. Paul City Council is the decision-making authority in this matter, summary disposition is not possible (or alternatively, desirable).⁴ The claim is partially correct. It is true that an Administrative Law Judge does not possess the power to enter a final judgment in favor of a licensee, in matters that have been referred to the Office of Administrative Hearings under Section 310.05 of the St. Paul Code. As the City correctly notes, these proceedings will result in a recommendation to the City Council for resolving this appeal.⁵

With that said, however, the City's further suggestion that summary disposition is never an appropriate result in these cases, is not well taken. In the view of the undersigned, nothing in Chapter 310 of the St. Paul City Code – nor in particular Section 310.05 of the St. Paul City Code – precludes an Administrative Law Judge from recommending summary disposition in favor of a licensee. Indeed, not only is the City's suggestion at odds with prior cases,⁶ the

¹ See, Affidavit of D. Johnson, Exhibits E and F.

² See, DRJ's Memorandum of Law, at 5-6.

³ See, LIEP's Memorandum of Law, at 2-3.

⁴ *Id.*, at 2.

⁵ See, St. Paul Leg. Code. Sec. 310.05 (c-1) ("Hearing procedures") ("The hearing examiner shall hear all evidence as may be presented on behalf of the city and the applicant or licensee, and shall present to the council written findings of fact and conclusions of law, together with a recommendation for adverse action") (<http://www.stpaul.gov/code/lc310.html>).

⁶ See, *Arenz v. City of Minneapolis*, OAH Docket No. 5-3100-8530-2 (1994) (Recommended Order to Dismiss claims follows from the conclusion of the Administrative Law Judge that the claims were barred by collateral estoppel) (<http://www.oah.state.mn.us/aljBase/31008530.rp.htm>); *In the Matter of the Teaching Licenses of Jon A. Falgren*, OAH Docket No. 69-1302-8572-2 (1994) (Recommended Order for Summary Disposition follows from the conclusion of the Administrative Law Judge that the claims were barred by collateral estoppel) (<http://www.oah.state.mn.us/aljBase/13028572.94.htm>); compare also, Minn. R. 1400.550 (K) (2005) ("Consistent with law, the judge shall perform the following duties ... recommend a

contention that the City could press a licensee that was otherwise entitled to judgment as a matter of law, to undertake a full-blown evidentiary hearing before being heard on its claims, raises troubling due process concerns.⁷ The City Code does not require such a trail of tears in order for a licensee to be heard.

As detailed below, however, summary disposition is not appropriate in this case. A few points deserve special emphasis.

First, a plain reading of the text of Judge Dorn's December 8, 2006 Order does not support the Licensee's claim that later licensing actions by the City were precluded. Indeed, to the contrary, beyond suspending the litigation on the city's claim that operation of Diva's Overtime Lounge represented a nuisance, the settlement agreement and Order accounted for the possibility of future licensing action.⁸

Second, even if the plain language of the Order did not speak to this point, the Licensee bears a heavy burden in establishing that the government has foresworn future enforcement actions as part of its settlement agreement. Estoppel of the government in the exercise of its police powers is not favored⁹ – and the Licensee has not established that such a result was intended here. The best reading of the November 2006 accord is that both parties set aside their then-current court battle and withdrew to see what the future would bring.

Third, application of the doctrine of merger and bar is inappropriate in this context because a nuisance claim under Minn. Stat. § 617.80, and a licensing action under Chapter 310 of the St. Paul City Code, have different elements,¹⁰

summary disposition of the case or any part thereof where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons").

⁷ Compare generally, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); *Wheeler v. City of Wayzata*, 533 N.W.2d 405, 409 (Minn. 1995) (prejudice "to those who have equities to be protected" is significant in the determination whether any delay in presenting claims is reasonable).

⁸ See, Affidavit of D. Johnson, Exhibit F.

⁹ See, e.g., *Ridgewood Devel. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980) (a party seeking to apply estoppel against the government has a heavy burden to bear and must show wrongful conduct on the part of the government); *Shetka v. Aitkin County*, 541 N.W.2d 349, 353 (Minn. App. 1995) (citations omitted), *review denied* (Minn. 1996) (a party seeking to estop the government "must show the government engaged in affirmative misconduct" and tribunals "must weigh the public interest frustrated by the estoppel against the equities of the case").

¹⁰ Compare, Minn. Stat. § 617.81 (2) (2006) ("Acts constituting nuisance") with St. Paul Leg. Code. Sec. 310.06 ("The licensed business, or the way in which such business is operated, maintains or permits conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public").

legal remedies¹¹ and decision-makers.¹² Settlement of the nuisance claim did not estop the City's from a later licensing action.¹³

For all of these reasons, DRJ is not entitled to summary disposition. This matter will proceed to an evidentiary hearing.

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¹¹ *Compare*, Minn. Stat. § 617.83 (2006) ("The order of abatement must direct the closing of the building or a portion of it for one year, except as otherwise provided in section 617.84 or 617.85, unless sooner released pursuant to section 617.87") with St. Paul Leg. Code. Sec. 310.05 (k) (Chapter 310 provides not only that "the cost of the administrative law judge" but also that of "city staff and attorney time" may be taxed as a cost of the adverse licensing action) and St. Paul Leg. Code. Sec. 310.06 (c) (in addition to obliging the abatement of "conditions or actions that constitute a nuisance," the City Council may impose the requirement that Licensees follow conditions that affirmatively "promot[e] security and safety in nearby neighborhoods"). Both such results appear to be beyond the relief that could be obtained under Minn. Stat. § 617.83.

¹² *Compare*, Minn. Stat. § 617.80 (2006) ("Upon proof of a nuisance described in section 617.81, subdivision 2, the court shall issue a permanent injunction and enter an order of abatement") with St. Paul Leg. Code. Sec. 310.05 (f) ("Where the council takes adverse action with respect to a license, licensee or applicant for a license, the resolution by which such action is taken shall contain its findings and determination, including the imposition of conditions, if any").

¹³ *Compare, e.g., Hauser v. Mealey*, 263 N.W.2d 803, 806 (Minn. 1978) ("The principles of merger and bar operate where a subsequent action or suit is predicated on the same cause of action which has been determined by a judgment") (citations omitted); *Ascher v. Comm'r of Pub. Safety*, 527 N.W.2d 122, 125 (Minn. App.), *review denied* (Minn. 1995) (the court rejected the argument that *res judicata* barred a proceeding to cancel driving privileges following a revocation of license under the implied-consent statute, because "a cause of action under one does not encompass a cause of action under the other").